9.

An Answer

TO THE

PROTESTATION

OF THE

Nineteen LORDS

Against the Rejecting of the

IMPEACHMENT

OF

Mr. *FITZ-HARRIS.*

THEY say, first, *That because in all Ages, it hath been the undoubted Right of the* Commons, *to impeach, before the Lords, any Subject for Treasons or any Crime whatsoever*; and the Reason is, *Because great Offences that influence the Parliament, are most effectually determined in Parliament*; *and hence they affirm, the Impeachment of Mr.* Fitz-Harris *unduely rejected.*

The *Parliament* is certainly the most High Court of the Nation, and by the Writs, the Members of both Houses are called to Treat, *de quibusdam arduis*, certain difficult Matters, or Things of a high Nature, which concern the *King*, *Kingdom*, and *Church*; and therefore 'tis rational, to think, that *any Crime whatsoever*, doth not properly fall under the *Cognisance* of this High Court; *nor can any Crime whatsoever*, be such a *great Offence*, as (to use their own Phrase) may influence the Parliament, and be most effectually determined in it. If this were admitted, in a short time the Jurisdiction of all inferiour Courts, would fall to the Ground; and, it may be supposed, it would be thought necessary, by these Noble Lords, to have a perpetual Parliament, for Goal-deliveries, and the determining Crimes and Misdemeanours of the lowest Nature.

The great Offence in this particular Case, is *High Treason*; and, if what hath been said above, be a valid and convincing Reason against the Lords, for rejecting the Impeachment, it doth seem to infer a *Necessity* or *Right* of trying *all Treasons* by *Impeachment* in *Parliament*; because they influence Parliaments, and are most effectually determined in them.

Certainly, if there were any Force in this Argument, or Reaſon, the Right of Tryal of High Treaſons was never underſtood before this time; for, in all Ages there have been Traytors, and the greateſt numbers of them have been tryed out of Parliament, either in the King's Bench, or in the Counties where the Treaſon was committed, or by ſpecial Commiſſion of *Oyer* and *Terminer*; or, Noblemen by a Lord High Steward, and their Peers; and very few have been tryed in Parliament, in reſpect of the many which have been tryed out of it: as for Inſtance, in later times, (*a*) the Duke of *Norfolk*, and Earl of *Northumberland*, ſixty ſix (*b*) petty Conſtables, and others, engaged in the *Northern* Rebellion, (*c*) *Carter Throckmorton*, and divers others; in the latter end of Queen *Elizabeth*'s Reign, the (*d*) Earls of *Eſſex*, *Blunt*, *Danvers*, *Davies*, and *Mericke* Knights, *Bainham*, *Orell*, *Littleton*, (*e*) Dr. *Parry*, who was arraigned at the Kings-Bench Bar in *Weſtminſter-hall*, condemned and ſuffered Death as a Traytor, in the Palace yard at *Weſtminſter*, ſitting the Parliament at that time. 3 *Jacobi*, the Gun-powder Traytors were tryed by Commiſſion of *Oyer* and *Terminer*, ſitting the Parliament, and the Regicides were tryed at the *Old Baily*, ſitting the Parliament, 1660.

(*a*) *Camb. Eliz.* A.D. 1572.
(*b*) *ibid.* A.D. 1569.
(*c*) *ibid.* A.D. 1584.
(*d*) *ibid.* A.D. 1601.
(*e*) *ibid.* A.D. 1585. fol. 308.

c. 29. By *Magna Charta*, no man is to be condemned, *but by lawful Judgment of his Peers*, which hath been confirmed and declared to be the Common Law of the Land, by many Acts of *Parliament*. The Houſe of Commons were never *choſen*, *intruſted*, or *impower'd* by the people they repreſent, to do any thing which is not according to the *Common Law*; nay, the whole Parliament cannot do any ſuch thing, unleſs they make a *Statute* firſt, to make *void* that *Law*.

'Tis farther the Common Opinion of *Lawyers*, That all Acts of *Parliament* are void in themſelves, or not binding, which are made againſt the Fundamental Laws, of which, if this Tryal by *Peers* be not one, there is none in *England*.

He knows not the value of *Tryal* by *Juries*, that deſires to be tryed any other way. 'Tis *dangerous*, and againſt the *Liberty* of *free Engliſh men*, to admit of, and have Precedents made to warrant Tryal without *Juries*, Innocents may be *harangued* to death by their Proſecutors, and the vileſt Criminals ſaved by the ſame means; the Speeches, paſſionate Expreſſions, and Inclinations of ſuch men prevailing much upon, and influencing the Witneſſes, either to *Contract*, or *Dilate* their *Evidence* againſt the *Perſon* Impeached, eſpecially when they know they may do it freely, with Impunity, and by approbation of potent Purſuers.

But, it may be ſaid, What if the Commons deſire to impeach a Commoner before the Lords, for Treaſon, may it not be done?

Yes, if the Lords be willing to receive the Impeachment; for they cannot be forced, or oblig'd againſt their wills to hear and paſs Judgment in Criminal, Capital Caſes, upon any but their own Peers.

Rot. Parl. N. 1, 2, 3, 4, 5. In the 4*th* of *Edward* the Third, in Parliament, *Simon Bereford*, *Tho. Gournay* and *John Matravers* Knights, *Bogo de Bayons*, *John Devarel*, and *William Ogle*, all Commoners, were ſentenced to Death by the Lords, for murthering King *Edward* the Second; and afterwards, in the ſame Parliament, when the Lords had given Judgment againſt them, a *Proviſo* and agreement was made and recorded, in theſe words;

Et eſt aſſenſu & accord. &c.

ibid. n. 6. And it is aſſented and accorded by our Lord the King, and all the Grands, in full Parliament, That albeit the ſaid Peers, as *Judges* of *Parliament*, took upon them, in the preſence of our Lord the King, to make and render the ſaid

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Judgment, &c. yet, that the ſaid *Peers*, who now are, or the *Peers* which ſhall be in time to come, be not bound or charged to render *Judgments* upon others than their *Peers*. For that the *Peers* of the Land have *Power* to do this; But thereof for ever to be *diſcharged* and *acquitted*. And the aforeſaid *Judgment* now rendered, be not drawn into Example or Conſequence in time to come, whereby the ſaid *Peers* may be obliged and charged hereafter to judge other than their Peers, contrary to the Law of the Land, if the like Caſe happen, which God forbid.

This *Proviſo* and *Agreement* was made in full Parliament, and it had theſe two *Reſpects*.

1. To ſatisfie the Commons, that the Lords intended not by their Judgment to alter the courſe of the *Common Law*, and therefore they declared and diſclaimed againſt Power to do this, and confeſſed, it was contrary to the Law of the Land.

2. To preſerve their own Right, to judge none but their Peers, in Caſe of Life and Death.

From hence it may be preſumed, that, if at any time the Commons *force* an *Impeachment* upon the Lords againſt a Commoner, for *Treaſon*, that may be try'd at *Common Law*, and then Vote that it ought not to be try'd in an Inferiour Court, men may be apt to cenſure ſuch Proceedings, and look upon them as a Deſign and Artifice, either to delay Juſtice, by deferring the Tryal of the Criminal, and, as it were, by that means, to *contrive* his *Pardon*, or by paſſionate *Harangues* to urge and procure his *Condemnation*, which might not have happened in Tryal by a Jury, who give in their Verdict upon Oath, and are not ſo eaſily encouraged, over-awed, or byaſſed by Rhetorick.

And, it may be farther urged, that there is a Statute yet in Force, intituled, *An Act to proceed, by Commiſſion of Oyer and Terminer, againſt ſuch Perſons as ſhall be examined and confeſs Treaſon before the King's Council, without remanding the ſame to be tryed in the Shire where the Offence was committed*; which ſeems moſt particularly to direct the Tryal of this Criminal, and the manner of it. 33 *H.* 8. c. 23. "Be it therefore Enacted by the *King*, our "Sovereign Lord, and by the Aſſent of the *Lords Spiritual and Temporal*, "and *Commons* of this preſent Parliament aſſembled, and by Authority of the "ſame, That if any Perſon or Perſons, being examined by the ſaid Council, "or Three of them, upon any manner of Treaſons, Miſpriſions of Treaſons, or "Murders, confeſs any ſuch Offence, or that the ſaid Council, or Three of them, "upon ſuch Examination, ſhall think any ſuch Perſon ſo examined, to be "vehemently ſuſpected of any *Treaſon*, *&c.* that then, in every ſuch Proceſs, by the King's Commandment, his Majeſties Commiſſion of *OYER* "and *TERMINER*, *&c.* ſhall be made, *&c.* to ſuch *Perſons*, and into "ſuch *Shires* or places as ſhall be named by the King, for the ſpeedy Tryal, Conviction, or Deliverance of ſuch Offenders; which Commiſſioners "ſhall have Power and Authority to Enquire, Hear, and Determine all "ſuch Treaſons, *&c.* within the Shire and places limited by their Commiſſion, by ſuch good and Lawful *Perſons* as ſhall be returned before them "by the Sheriff, or his Miniſter, or any other, having power to return "Writs and *Proceſs* for that purpoſe, in whatſoever Shire or place, within "the King's Dominions or without, ſuch Offences of Treaſon ſo examined, "were done or committed; and that, in ſuch Caſes, no Challenge for the "Shire or Hundred ſhall be allowed.

Secondly, *They ſay they cannot reject the Impeachment of the* Commons, *becauſe that Suit or Complaint can be determined no where elſe; for, if the Party im-*

impeached, ſhould be indicted in the King's Bench, or in any other Court, for the ſame Offence, yet it is not the ſame Suit; for, an Impeachment is at the Suit of the People, and they have an Intereſt in it, but an Indictment is at the Suit of the King.

This is all *artificial Reaſon*, or rather a mere *Quibble*, if duely examined; for, whether this *Criminal's Tryal* be by Indictment in the King's Bench, or by Impeachment, 'tis the ſame Accuſation, namely, for *Treaſon*, and the *Proſecution* in both Courts (which is really and truly the Suit) is for the ſame end and purpoſe; that is, That the *Delinquent* be puniſhed according to *Law*; for 'tis to be ſuppoſed that was the Intent of the *Impeachment*, and this may be done moſt *effectually* and *legally*, by the *Tryal* of his *Peers*, in an inferiour Court, according to the *Courſe* of the *Common Law*.

The ground of this wonderful Reaſon, is the different uſe of the two Words, *Impeachment* and *Indictment*, both which, ſignifie an Accuſation, and the End and Deſign of his Accuſation, is the ſame; and 'tis no great matter, whether this black Criminal receives the Sentence of being Hanged, Drawn, and Quartered, for his vile Treaſon, from the *Lords* in *Parliament*, the *Judges* of the *King's Bench*, or by *ſpecial Commiſſion*, of *Oyer* and *Terminer:* but, moſt certainly, the moſt Legal way of *Tryal*, is by his *Peers*, by whom he may have the moſt equal Condemnation or Aequittal, there being not one precedent to be found, that comes up to, or is parallel with this Caſe.

Nor is the pretended preſervations of the Intereſt of the people, an Argument of greater Moment, for, firſt it is very difficult, in Caſes of Treaſon, to ſeparate and divide the Intereſt of the King and People from each other. Have not the people an Intereſt in the King's Life and in the Government, and is not this Intereſt the ſame with the Kings? The preſervation of both, is the joynt Intereſt of both, which really cannot be divided.

Secondly, the *Intereſt* of the people is *founded* upon *publick Good* and *Benefit*, by that it is meaſured, and of that they have their ſhare; ſo that tho it ſhould be granted, one and the ſame publick Crime or Offence may intitle both King and People to ſeveral Suits; yet, if by either Suit, ſuch Offence may be duely, legally, and effectually heard, diſcuſſed and puniſhed, the Intereſt of the people is equally ſafe, which way ſoever it ſhall be determined, whether in *Parliament*, or in an *inferiour Court*, in which laſt, ſuch publick Crimes as this have been moſt frequently tryed. 'Tis not the *Name Greatneſs* or *Title* of the *Court*, but the *Publick Juſtice*, that is legally done in it, that ſecures the *Rights* and *Intereſt* of the people.

Thirdly, The Proteſting Lords ſay, by way of Example, or putting a Caſe, to confirm, or at leaſt to illuſtrate their Reaſons, *That one and the ſame Offence may intitle ſeveral Perſons to ſeveral Suits; as if a Murder be committed, the King may indict at his Suit, and the Heir or Wife of the murdered Party, may bring an Appeal, and the King cannot releaſe that Appeal, nor his Indictment prevent the Proceedings in the Appeal, becauſe the Appeal is the Suit of the Party, and he hath no Intereſt in it.*

But, this Example of an Appeal in Murder, if rightly underſtood, ſignifies nothing either to the Confirmation, or Illuſtration of the Reaſons of their Proteſtation.

For,

For an Appeal of Murder in our Common Law, ſignifies an *Action* or *Suit* given by the Law to the Wife, for wrong done to her Husband being murder'd, or to the Heir, for wrong done to his murder'd Father, Brother, or Anceſtor; and any one that * ſues an Appeal, muſt ſue it in proper perſon, and for advantage to be taken by the Wife, or Heir, for this wrong done, is the reaſon aſſigned in the Law Books, why an Appeal is given to them; and why the King cannot releaſe an Appeal, which is to be brought within a year and a day; and if the Appellants fail in proof of the Accuſation, the Appellees ſhall recover Damages againſt them or their Abettors.

Coke 1ſt. *Inſtit. fol.* 123. & 187. *b.* **Shepards Abr. word* Appeal. *Stat.* 30. *Hen.* 7. *c.* 1.

To make an Impeachment of the Commons the ſame with this caſe, they muſt make it appear by precedents out of the *Parliament Rolls* or *Journals*, or by the *Common* or *Statute Law*, that the *Commons* have ſuch an Action or Suit as an Impeachment of a Commoner for Treaſon, which may be tried in an inferiour Court given them before the Lords, ſo as they cannot refuſe to hear and judge it, or they do nothing.

Otherwiſe it may be in Impeachments for Miſdemeanors: Where though the Common Law may take notice of them, yet happily the Miſdemeanor may be ſuch as it cannot be ſufficiently puniſhed thereby; but for all High-Treaſons, the *Law* hath provided *ultimum ſupplicium*, which is ſufficient, and after that there can be no other Inflicted.

To inforce this Inſtance of an Appeal, they add by a Note in the Margin, *That it is always to be preferred, and upon notice thereof, all Proſecutions at Suit of the King are to ſtop, till the Proſecution at the Suit of the party be determined*: But the *Statute Law* is otherwiſe. The time limited for an Appeal to be taken, is a Year and a Day, and the King ſhall not ſtay this Year and Day from Proſecution at his Suit, to ſave the Suit of the party as was anciently accuſtomed, but may Arraign the Murderer at any time within the Year and Day, and not tarry that time, for any Appeal to be taken for the ſame Murder, but if the Murderer be Arraigned and Acquit at the Kings Suit, the Wife or next Heir to him that is Slain, may have and take their Appeal, within the Year and Day after the Murder done againſt the Perſon, ſo Arraigned and Acquit.

3. *Hen.* 7. *c.* 1.

There have been alſo Appeals of another nature, made and purſued in Parliament, as well againſt Peers as Commoners, by certain *Lords* called Appellants, which cauſed great Miſchiefs and inconveniencies in the Realm, and therefore it was *Ordained and Eſtabliſhed: That from henceforth, all Appeals to be made of things done within the Realm, ſhall be tryed and determined by the good Laws of the Realm, and it was then Accorded and Aſſented, that no Appeals be from that time made or purſued in Parliament, in any time to come.*

Vide pl. Coron. coram Rege in Parliamento. 21. *Rich* 2. *Stat.* 1. *H.* 4. *c.* 14.

The Word *Appeal* ſignifies an Accuſation, and ſo doth the Word *Impeachment*, and the Word *Impeachment* ſeems to have been more frequently uſed for *Proſecutions* in *Parliament*, when the Word *Appeal* grew out of uſe; now if all Appeals which had been before brought in Parliament, and being chiefly in *Capital* and *Criminal* Cauſes, were removed from that *Judicature* by this *Law*, and referred to be Tryed by the *Laws* of the *Land*, why ought not Impeachments of a Commoner for Treaſon by the Commons, to be alſo referred to the Common *Law*, ſeeing great Inconveniences and Miſchiefs may ariſe from this way of Tryal, by the

Impeached perſon loſing his Tryal by his Peers, or by being wronged by a paſſionate and violent proſecution, or the King and Nation injured by the too remiſs and cold management of a contrived Method of Accuſation? 'Tis not to be doubted, but the Ground and Reaſon of this *Law* is and may be the ſame againſt impeachments of Commoners, that it was againſt Appeals; and therefore by conſequence in force againſt them, eſpecially ſeeing there is not ſo much as one Precedent to warrant them, and in truth an impeachment of the Houſe of Commons, is no other than an Appeal to the King in Parliament.

Theſe *Lords* interpret this Rejection of the impeachment to be an abſolute Denyal of Juſtice, becauſe they ſay as before, *the ſame Suit cannot be Tryed any where elſe*; it hath been ſhewn before, that this reaſon is a meer Quibble of a fond Groundleſs Nicety. Nor can any Man, though but of a mean capacity, think it to be a denyal of Juſtice to refer the Tryal of a *Crime* to an *Inferiour Court*, where it is moſt properly tryable by the *Laws* of the *Land*. Nor was it certainly a Denial of Juſtice in the *Lords* in *Drakes Caſe*, which they ordered to be Tryed in the Kings Bench. The Words of the Order are theſe:

Lords Journal, Merc. Dec. 19. 1660.

'The Houſe taking into conſideration the Impeachment, brought up 'from the Houſe of Commons in the name of all the Commons of *England*, 'againſt *William Drake*, Merchant and Citizen of *London*, and their Lord-'ſhips apprehending they may not have time before their Diſſolution to 'proceed in Judicature againſt him: It is therefore ordered and declared 'by the Lords in Parliament, That the King's *Attorney General* do in His 'Majeſty's Name proceed againſt the ſaid *William Drake* in the Court of '*Kings Bench*, upon the ſaid Offences, according to the ordinary courſe of 'Law.

This reference of this Caſe to the *Kings Bench* was not proteſted againſt by any of the Houſe of Peers, nor ſo much as queſtioned, nor thought to be Arbitrary, Illegal, or againſt the conſtitution of Parliament: His Crime was for publiſhing a Pamphlet in the name of one *Phillips*, called, *The Long Parliament revived*; the Impeachment was in this form:

Com. Journal, Mart. Dec. 4. 1660.

'The Knights, Citizens, and Burgeſſes of the Houſe of Commons, in the 'name of themſelves, and all the Commons of *England*, do hereby declare, 'complain, and ſhew againſt *William Drake*, Merchant and Citizen of '*London*, That in contempt of His Majeſty's Crown and Dignity, and of 'the Laws and Government of this Kingdom, and out of a wicked and 'malicious intention to raiſe and ſtir up Sedition and Diviſion in this 'Kingdom, and againſt the Peace of our Soveraign Lord the King, *&c.*

By this proceeding of the Lords, it ſeems they thought not then, that one and the ſame Impeachment might continue from Parliament to Parliament without being revived, or a new one brought up; and a man would think they had reaſon on their ſide; for 'tis hardly conceivable, when a Court is diſſolved and not in being, how any thing depending in that Court ſhould have a Being, and remain: What can ſupport it? What can give it a Being, or Exiſtence? In the Prorogations of Parliaments all buſineſs ceaſeth, and begins anew, much more it ought to do ſo, when the Court it ſelf falleth and loſeth its Being.

Laſtly,

Laſtly, they ſay, *Our Law ſaith, in the Perſon of the King, Nulli negabimus Juſtitiam, We will deny Juſtice to no ſingle perſon; yet here in this caſe, as they apprehend, Juſtice is denied to the whole Body of the people, and this may be interpreted, an exerciſing of Arbitrary Power, and will, as they fear, have influence upon the conſtitution of the* Engliſh *Government, and be an encouragement to all inferiour Courts to exerciſe the ſame Arbitrary Power, by denying the Preſentments of the Grand Juries*, &c.

As to denial of *Juſtice* in this caſe, it hath been clearly made appear before, there neither is, nor can be any ſuch thing, by rejecting this Impeachment, and referring the Treaſon contained in it to be *determined* and *tryed* by the *Common Law*; and therefore *what is not*, nor *can be*, cannot be interpreted an *exerciſing* of *Arbitrary Power*, nor have any *influence* upon the *conſtitution* of the *Engliſh* Government.

This whole laſt Paragraph is indeed a *ſevere Reflection*, rather than *Reaſon* (to what end it's needleſs to tell the World) for this very action of *waving* this *Impeachment* is ſo far from encouraging *inferiour Courts, to exerciſe* an *Arbitrary Power*, by *denying* the *Preſentments* of *Grand Juries*, as manifeſtly it hath a contrary operation and effect in Law, for by this means, this great *Conſpirator* in the *Popiſh Plot* to murder the *King*, and deſtroy and ſubvert the *Proteſtant Religion*, will receive his Tryal as the *Law* directs, by *Preſentment* and *Verdict* of a *Grand Jury*, and *Petty Jury*, one or both, who are his Peers.

Having done with the proteſtation it ſelf, it may not be impertinent to make a Query or two about the ſubject matter of the Indictment, and Impeachment. *What if there be ſeveral and different Treaſons, for which Mr.* Fitz Harris *may ſtand accuſed? Shall not the King proceed to try him according to the due courſe of Law?* The Treaſon for which he is proſecuted at Law may not be the ſame, and in all probability it is not, for which he was impeached: The Houſe of Commons declared not what the Treaſon was in particular, and the King had the firſt poſſeſſion of the Caſe, having firſt examined the Criminal. *Shall the courſe of the Common Law be obſtructed, or delayed by the Impeachment?* When if he receives not ſentence of Death upon his firſt Indictment at Law, he may be remanded to Priſon, and afterwards proſecuted by Impeachment, or upon new Indictments at the Common Law for his other Treaſons, if the Gentlemen of the late Houſe of Commons, who have, or received the Information againſt him, ſhall think it expedient. *Have not all the horrid damnable* Popiſh Plotters *which were Commoners been tryed by the Common Law, notwithſtanding the Sitting Parliaments? What neceſſity is there then of an extraordinary way by Impeachment?*

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